FILE COPY.

Office Supreme Court U. S.
FILED
NOV 27 1905
JAMES H. McKENNEY,
Clerk.

No. 308.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN W. BALLMANN, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

JOHN W. BALLMANN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 308.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

BRIEF FOR THE UNITED STATES.

The brief upon this writ of error will be confined, mainly, to the discussion of those matters of fact and evidence not properly before the court on the habeas corpus appeal, and which were therefore not fully discussed in the Government briefs in that case. Little if anything will be added upon the constitutional questions.

Scope of the questions presented.

It is important to bear in mind the exact scope of the questions arising on this record. Ballmann was finally ordered to be committed (Rec. on habeas corpus appeal, p. 13, which is the record referred to throughout this brief), not for failing to produce all his books

and papers, in response to the general order of April 10, entered as of April 7 (Rec., p. 19), referred to in the first assignment of error, but for refusing to obey the order of April 8, 1905 (Rec., pp. 12–13), which required him to produce "the said cashbook and answer the questions set out in said charges of contempt." The charges referred to were those presented by the grand jury on April 8 (Rec., pp. 11–12), which alleged that Ballmann had wilfully failed and refused to produce "*a certain cashbook in use in his business*," as required by the subpœna served on him on April 7, and had also refused to answer the two questions therein set forth as to the reference of the folio numbers in the ledger which he did produce. The subpœna of April 7 commanded Ballmann "to bring cashbook, ledger, letter press copy books & all sheets showing transactions under the name of A. Smith & A. Johnson during months of Dec., 1904, & Jan. & Feb., 1905," and to appear and testify before the grand jury. (Rec., p. 43).

In his written answers before the grand jury in response to the order of April 8 Ballmann said (Rec., pp. 22, 46):

> I have not now, and neither at the time of nor at any time since the service of the first subpœna upon me in this matter have I had in my possession or under my custody or control the book referred to in the order of the court entered on April 8, 1905, or any book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same.
>
> I decline to answer the questions contained in said order of April 8, 1905, on the ground

> that it might tend to criminate me, and in this connection I produce copy of a petition filed against me and others by Emanuel Oppenheimer in the Court of Common Pleas of Hamilton County, being case No. 126,824, and I state that there are many other actions of the same kind pending against me.

At the trial, his counsel said (Rec., p. 41):

> As to the book, we say to your honor we haven't got it. As to the questions, Mr. Ballmann requests me to place this in your honor's hands.

The following paper was then produced and offered in evidence (Rec., pp. 41, 42; Exhibit G, p. 43):

> As to the questions asked I refuse to answer, as they might tend to criminate me.

It is clear from these answers that, so far as "the book referred to in the order of the court of April 8, 1905," is concerned, no privilege or immunity under the Constitution or laws of the United States is set up or claimed, but the issue made is simply whether he had said book in his custody or under his control at that time, or at the time of the service of the subpœna on April 7, or at any time since such service. He certainly can not be permitted, after denying that the book referred to was in his possession or under his control, to stultify himself by saying, "The book is in my possession and under my control, but to compel me to produce it will expose me to a criminal prosecution for failing to comply with the order entered as of April 7," which he contends was unconstitutional. Yet this

seems now to be his position. (See brief for appellant on habeas corpus appeal, pp. 16–22.)

As to the cash book, then, the inquiry on this writ of error is limited to the points whether the evidence adduced warranted the District Court in finding that it was in his possession and under his control, and whether such evidence was admissible. No question of illegal search and seizure or compulsory self-incrimination under the Fourth and Fifth Amendments is presented.

It is only in regard to his refusal to answer the questions as to the folio references in the ledger that his constitutional immunity against being compelled to testify against himself was asserted. In his answers before the grand jury he referred, as giving color to this contention, to certain civil proceedings in an Ohio court based upon his alleged violation of the State laws against gambling. In the Government's supplemental brief on the habeas corpus appeal (page 13) it was stated that that matter was not before the District Court. This was too broad, since it was referred to in his answer before the grand jury. But it is substantially correct, because he abandoned this position at the trial and suggested perjury in having previously denied the existence of the cashbook as the sole basis of his privilege. (See opinion of Judge Thompson, Government's original brief on habeas corpus, p. 61.) The paper filed at the hearing (Exhibit G) contained no reference to the Oppenhimer case. (Rec., pp. 41, 43.) It also appears that he contended that his own bare state-

ment that an answer to the questions put would tend to criminate him was sufficient to entitle him to the constitutional immunity. (Rec., p. 42.) In this court on the habeas corpus appeal he has asserted all these claims, and he apparently reasserts them all in this case.

I.

AS TO THE QUESTIONS.

The nature and extent of the constitutional immunity in respect to the questions asked by the grand jury has been discussed at length in the Government briefs already on file. It is manifest from the authorities there cited—

(1) That it is for the court to determine, from the circumstances of the particular case, whether a direct answer to the question asked might criminate the witness.

(2) That perjury committed in the course of the same examination—which would be exposed by a direct answer to the question asked—is a necessary exception to the immunity claimed.

It is also clear that, aside from the matter of perjury in denying the existence of the cashbook, a direct answer to the questions asked will not in any way tend to incriminate Ballmann.

The first question was (Rec., p. 1):

> State what on account No. 140 sheet No. 1, on this big ledger now in use in your business, these figures under the word "folio," on the debit side of the account, to wit Nos. 349, 349, 349, 349, 349, and 351 refer to.

Of course the natural inference, from what we know the object of these questions to be, is that the numbers stated referred to a cashbook. But it is beyond any divination to see how the fact that Ballmann used a cashbook in his business could tend to criminate him in any way. It is possible, however, that the numbers refer to some other book, paper, or slip. But the result, so far as the incrimination of the witness is concerned, would be the same. It is equally lawful to use in one's business a slip, a piece of paper, or another book, as a cashbook.

The second question was (Rec., p. 2):

> Do not these figures, 349, in your handwriting, refer to the folios in your cashbook in use in your business in January, 1905?

Here there can be no question as to the answer. If direct, it must be "yes" or "no." If "yes," he has simply acknowledged that he has used a cashbook in his business. That mere fact alone would afford no evidence against him in a criminal proceeding for violating the State laws against gambling or any other statute, Federal or State, barring perjury. If the cashbook contained criminating evidence, he could doubtless resist its production in any such proceeding on that ground. But there is nothing criminal or suggestive of criminality in his using a cashbook in his business, unless he deliberately perjured himself at the outset before the grand jury and a truthful answer now would convict him. His immunity certainly can not extend that far.

In this case, it will be remembered, Ballmann did not refuse to produce the cashbook in question on the ground that it contained evidence that might criminate him, but rested his case on a denial that such a book had, to his knowledge, been used in his business, or that the book at the time of the service of the subpœna or since was in his possession or under his control.

II.

AS TO THE CASHBOOK.

The evidence adduced justified the District Court in finding that Ballmann had in his possession or under his control the cashbook in question.

The following is from the testimony of Foreman Dieterle (Rec., p. 27):

> Q. Mr. Dieterle, state whether or not on yesterday, in the investigation before the grand jury, Mr. Ballmann produced a cashbook which was called for by his subpœna.
>
> A. He did not.
>
> Q. Will you state whether or not, on this morning, before said grand jury, he produced said cashbook which he was called upon to produce in his subpœna?
>
> A. He did not.
>
> Q. Will you state what he said with reference to the cashbook being used in his business during the months of December, 1904, and January, and February, and March, and up to April 6, 1905?
>
> * * * * *
>
> A. The question was asked, and he said there was no such book to his knowledge.

In his written answer before the grand jury, in response to the order of April 8, 1905, Ballmann said (Rec., pp. 22, 46):

> I have not now, and neither at the time of nor at any time since the service of the first subpœna upon me in this matter have I had in my possession or under my control the book referred to in the order of the court entered on April 8, 1905, or any other book showing transactions under the name of A. Smith or A. Johnson, and am unable to produce the same.

At the trial his counsel said (Rec., p. 41):

> As to the cashbook, we say to your honor we haven't got it.

The evasive and contradictory character of these statements is apparent. An honest, straightforward man, with nothing to conceal, if questioned as to a cashbook in use in his business, would have answered, if such were the fact, that there was no such book, and stuck to that answer all the way through.

But here we have, first, a denial by Ballmann that there was such a book as that referred to in the subpœna of April 7, qualified, however, by the words "to his knowledge," followed by a statement that "the book referred to in the order of the court entered on April 8, 1905," that is, the book showing transactions under the name of A. Smith or A. Johnson, called for by the subpœna, was not then and had not at the time or since the service of the subpœna been in his possession or under his control—not that there was no such

cashbook, or that it had not been in his possession or under his control prior to the service of the subpœna.

A plainer acknowledgment of the existence of the book could hardly be expected from such a source.

The existence of the cashbook referred to in the subpœna having been thus confessed, it follows that it and the cashbook shown to exist by the undisputed testimony of his own employees were identical, since but one cashbook appears to have been used in his business.

Reluctant and evasive as their testimony was, it clearly shows that a cashbook had been used in Ballmann's business up to April 3 at least, a cashbook in which the daily transactions of the house were entered, and hence a cashbook which would show any transactions that might have been carried on under the name of A. Smith or A. Johnson. (Testimony of Clements, Kramer, and Hunt, Rec., pp. 28, 33, 38.) Clements, it is true, claimed that this particular cashbook was used by him personally; but he was Ballmann's bookkeeper (Rec., p. 32), and he admitted that the cashbook referred to was used in the conduct of Ballmann's business (Rec., p. 28). The right of Ballmann to control any book used in the conduct of his business will hardly be questioned. There can be no doubt that he knew of the existence of this particular book, and the evidence shows that he used it himself.

It will be observed that in response to the subpœna of April 7, directing him to bring cashbook, ledger, etc., showing transactions under the name of A. Smith

and A. Johnson, Ballmann produced the ledger in use in his business. Yet the command to produce the ledger was no more definite than the command to produce the cashbook. If the ledger did not show transactions under the name of A. Smith and A. Johnson, why was it produced, since he claims that he thought only books showing such transactions were desired; and if it did show such transactions is it not a fair inference that the cashbook used in his business also did, the ledger being ordinarily posted from the cashbook, or else that he produced the ledger because it did not show such transactions and withheld the cashbook because it did? At any rate, he knew, from the question asked by the grand jury as to the cashbook in use in his business, and from the evidence given of the existence of such a cashbook, that that was the book he was expected to produce, and the production of which, whether it showed transactions under the name of A. Smith and A. Johnson or not, would satisfy the order of the court.

The only persons besides Ballmann who personally knew what the cashbook used in his business contained were Clements and Hunt. The hostile, reluctant, and evasive character of their testimony is apparent. Clements, who claimed the book to be his own, when questioned as to what transactions appeared upon it during the period in question, said that he could not remember. (Rec., p. 31.) Being pressed a little further, he made the general statement that some people paid him money and he credited it, and that when he paid some people he put it on then; but

didn't always fix up the cash; sometimes it was on slips. (Rec., p. 31.)

It is manifest that nothing would have been gained by a direct question as to whether the cashbook in question showed transactions under the name of A. Smith or A. Johnson.

Proceedings before the grand jury not improperly disclosed.

No exception appears to have been taken to the admission of testimony as to what took place before the grand jury upon the ground that such proceedings were secret and not subject to be gone into in this way. Counsel seem to have recognized the well-settled rule that the proceedings of a grand jury may be disclosed, either by a member thereof or any other person present, whenever it becomes necessary to the due administration of justice.

Wharton's Crim. Ev. (8th ed.), sec. 510, and cases cited in note 2.

1 Bishop on Crim. Proc. (1st ed.), sec. 729, and cases cited in note 4.

9 A. & E. Ency. of Law (1st ed.), p. 17, and cases cited in note 7.

United States v. *Reed* (27 Fed. Cas., 727, 738).
United States v. *Farrington* (5 Fed. Rep., 343).
United States v. *Terry* (39 Fed. Rep., 355).
United States v. *Cobban* (127 Fed. Rep., 713).

In *Counselman* v. *Hitchcock* (142 U. S., 547) there was likewise no objection to the disclosure of the proceedings before the grand jury for the purposes of the contempt case.

The adverse witnesses properly examined.

Error is assigned in allowing the United States attorney to pursue the method he used in examining Witnesses Clements, Hunt, and Kramer. (Eleventh assignment of error, *k*.)

These witnesses were manifestly hostile and adverse, and their testimony, in view of their former statements before the grand jury, in some respects surprising. The method of examination pursued was absolutely necessary to elicit the truth, and moreover was in strict accord with the established practice in Ohio, and is sustainable on principle and authority.

The rule in Ohio was finally established in *Hurley* v. *The State* (46 Ohio St., 320). In that case a witness upon a murder trial testified in some respects differently from what he said at the coroner's inquest and before the grand jury. He was examined by the prosecution as to his statements upon the two former occasions, and having denied making certain statements read to him from the notes of his testimony taken down by the coroner's clerk, the State called the clerk as a witness for the purpose of contradicting him.

The Supreme Court of Ohio held that it was permissible to examine the witness as to his former statements before the grand jury and at the coroner's inquest, and for this purpose his previous declarations might be repeated to him, and he might be called upon to say whether they were made by him; but that if he denied having made such statements, or his answer was

ambiguous concerning them, it was not competent for the party calling him to prove them by other witnesses.

Upon the first proposition, the court said (pp. 322–323):

> It is a well-established rule of evidence that a party is not concluded by the unfavorable testimony of his own witness, but may prove his case by other evidence. He is not precluded from proving any fact relevant to the issue by any competent evidence, though it be a direct contradiction of the testimony of a former witness called by him. And generally, where a witness is an unwilling one, or hostile to the party calling him, or stands in a situation which makes him necessarily adverse to such party, his examination in chief may be allowed to assume something of the form and character of cross-examination, at least to the extent of permitting leading questions to be put to him. But a further question arises in this case, and it is whether the party calling a witness may, upon being taken by surprise by his unexpected adverse testimony, be allowed to examine him concerning declarations or statements previously made by him which are inconsistent with his testimony. That such previous declarations can not thus be made substantive evidence of the facts stated is conceded, nor can such examination be permitted merely to impeach the witness.
>
> But, if the testimony of the witness is material to the cause, it is of importance that it be true. It not unfrequently happens that a witness, under the embarrassment of an examina-

tion, forgets or omits to state facts within his knowledge, or is disinclined to disclose fully and definitely what he knows. Ample opportunity should be afforded for the correction of such mistakes and omissions, and for eliciting fully the facts that are material to the issue. The recollection of the witness may be so refreshed by directing his attention to a former conversation or declaration as to cause him promptly to correct his testimony or explain the apparent inconsistency. For this purpose such examination may afford valuable aid in judicial investigation; and, if it be competent at all for that purpose, the reason for admitting it would seem to require that the examination should be allowed to extend so far as to permit the former statements to be repeated to the witness and inquiry to be made of him concerning them; for the repetition of the statement itself, referring to the circumstances of its utterance, would be the most likely means of awakening the recollection of the witness, enabling him to recall the facts, satisfy him of his mistake, and induce a correction or explanation. *Or, if the witness be a perverse or false one, such examination may serve to probe his conscience, and move him to relent and speak the truth.*

We think it a reasonable rule that a party who calls a witness, and is taken by surprise by his unexpected adverse testimony, may be permitted to interrogate him in respect to declarations and statements previously made by him which are inconsistent with his testimony, for the purpose of refreshing his recol-

> lection and inducing him to correct his testimony, or explain his apparent inconsistency, and for such purpose his previous declarations may be repeated to him; and he may be called upon to say whether they were made by him. Well-considered cases and text-books of authority recognize the rule as stated.

This case was followed in *Mustill* v. *Thornton* (22 Ohio Cir. Ct., 608), where it was held competent for a party to question his own unwilling witness on reexamination for the purpose of contradicting the testimony given by him on cross-examination. "Such examination," the court said, in stating their agreement with *Hurley* v. *State*, "affords valuable aid in judicial investigations, and [we] deem it competent for the purpose of proving the conscience of a witness, refreshing his recollection, and giving him an opportunity of correcting his testimony, and of explaining his apparent inconsistency."

In *St. Clair* v. *United States* (154 U. S., 134, 150), this court said:

> An exception was taken to the mode in which the district attorney was permitted to examine one of the witnesses introduced by the Government. The attorney announced that the answers of the witness had taken him by surprise and asked that he be permitted to put leading questions to him. This was allowed, and we can not say that the court in so ruling committed error. In such matters much must be left to the sound discretion of the trial judge who sees the witness and can therefore determine in

the interest of truth and justice whether the circumstances justify leading questions to be propounded to a witness by the party producing him. In *Bastin* v. *Carew* (Ryan & Mood., 127), Lord Chief Justice Abbott well said that "in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice." The rule is correctly indicated by Greenleaf, when he says: "But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or that the witness has recently been brought under the influence of the other party and has deceived the party calling him. For, it is said, that this course is necessary for his protection against the contrivance of an artful witness, and that the danger of its being regarded by the jury as substantive evidence is no greater in such cases than it is where the contradictory allegations are proved by the adverse party." (1 Greenl., Ev., 12th ed., sec. 444; Taylor on Ev., 6th ed., sec. 1262A; *Regina* v. *Chapman*, 8 Car. & P., 558, 559; *Regina* v. *Ball*, 8 Car. & P., 745; *Clarke* v. *Saffrey*, Ryan & Mood., 126.)

The history of the rule forbidding the impeachment of one's own witness, together with the reasons *pro* and *con*, are fully set forth in Wigmore on Evidence, Volume II, sections 896–906. It is apparent from the authorities there cited that, whatever the ancient rule, the

modern tendency is to uphold such questions as are necessary to elicit the truth, even if they involve an apparent contradiction of one's own witness. See also cases cited in 3 Taylor on Evidence (9th ed.) 978.

It will be observed that the Government receded from its attempt to impeach the witness Clements by recalling Foreman Dieterle to testify as to what he said before the grand jury. (Rec., 41.) The examination of Ballmann's employees was therefore strictly in accordance with the Ohio rule as laid down in *Hurley* v. *State* (supra). They were simply questioned as to what they had said before the grand jury, and their answers accepted for what they were worth.

The proceedings below constituted due process of law.

The eighth and ninth assignments of error raise the question of due process of law, alleging that the court refused defendant a reasonable opportunity to secure counsel and prepare for a hearing, and required him to proceed without a specific information.

The record shows (pp. 25, 26, 41) that the court allowed defendant the benefit of counsel and also an opportunity to make his defense, but refused to accede to his requests for delay. This procedure was perfectly proper.

Ex parte Terry, 128 U. S., 289, 307.
Savin, Petitioner, 131 U. S., 267, 277.

Under the authority of the above cases, the court might have adjudged Ballmann in contempt without further proof or examination, upon the report of the

grand jury of his noncompliance with its order, as the refusal to testify before that body was a contempt committed in the face or under the eye of the court, the grand jury being a part of the court. (Bailey on Jurisdiction, 350.)

The court, however, did not proceed in this summary manner, but gave Ballmann abundant opportunity to be heard.

He was fully advised by the report of the grand jury as to the nature of the charge against him, to wit, disobedience of the order of April 8. He was not entitled to trial by jury (*In re Debs*, 158 U. S., 595, 596), and consequently to none of the formalities incident thereto. In affording him opportunity to be heard, the court went as far as was required. (*Savin, Petitioner*, 131 U. S., 278, citing upon this point *Randall* v. *Brigham*, 7 Wall., 523, 540.)

Ballmann was not entitled to have his answers taken as conclusive, even assuming that they were properly authenticated by oath. It is for the court to determine whether such answers are sufficient.

> *United States* v. *Debs* (64 Fed. Rep., 724, 738) and authorities cited.
>
> *United States* v. *Sweeney* (95 Fed. Rep., 434, 447).

Nor was he entitled to the benefit of section 860, Revised Statutes, in respect to the ledger which he voluntarily produced or statements which he voluntarily made.

> *Tucker* v. *United States* (151 U. S., 164).

In response to a subpœna to produce books, papers, etc., the witness must claim his privilege, or else his compliance with the subpœna will be regarded as voluntary.

United States v. *Kimball* (117 Fed. Rep., 156).

The judgment and order of commitment were fully authorized by law.

The tenth assignment of error alleges that the judgment and order of commitment are illegal and void, "because they are indefinite and uncertain, and because the punishment inflicted is indefinite and in violation of the Constitution and laws of the United States."

The final judgment, entered April 10 (Rec., pp. 13, 24), was that Ballmann be confined and imprisoned in the county jail, "in accordance with the former order of this court." The "former order" was that made April 8, which directed that "said John W. Ballmann produce the said cashbook and answer the questions set out in said charges of contempt at 12 o'clock noon, Monday, April 10, 1905, before said grand jury, and in default thereof that he be committed to and confined within the jail of Miami County, Ohio, until he complies with the order of this court or is discharged by due process of law." (Rec., pp. 12–13.)

The commitment directs "that the said John W. Ballmann be imprisoned in the jail of Miami County, Ohio, until he answers the questions and produces the book as he was required." (Rec., pp. 24–25.)

The authority of a court of record to coerce compliance with its orders by committing the contemnor until

he submits or is discharged by further order of the court is well settled.

Tinsley v. *Anderson* (171 U. S., 107–108).
In re Allen (13 Blatch., 271; Fed. Cas., No. 208).
Fisher v. *Hayes* (6 Fed., 74).
Rapalje on Contempt, 179.
Bailey on Jurisdiction, 323.
7 A. & E. Ency. of Law (2d ed.), 68, and cases cited.

In the *Case of Yates* (4 Johns., 318), where the order was that the contemnor be "committed to jail, there to remain until the further order of the court," Chancellor Kent said (p. 375):

> If the time should be definite in the sentence, the court could not alter it, even upon the submission of the party; and it would operate rigorously upon him. The courts would feel obliged to commit for a time adequate to make due reparation for the contempt, without any submission. It is the established course, in the courts of law and equity, and in the legislature, to receive the submission of the party, whenever he is ready to offer it, and, on reasonable satisfaction made, to discharge him. The party offending ought to submit, and the form of the order is the most effectual way to ensure it. There is no such thing as the abuse of this power in modern times. The case probably is not to be found. An alarm can not be excited at its existence, in the extent now laid down. It is given to the courts only for their preservation, in order to enable them to repel insults, to protect suitors, to support their process, and to be an asylum from violence and oppression.

Where an offender has been committed until he submits, or until further order of the court, or until he is discharged by due process of law, his case is manifestly still under the jurisdiction and control of the court; consequently the court may enter any further order in the premises which the necessities of the case and the due administration of justice may require. If the situation has changed so that it would be impossible for him to comply with the mandate of the court, he would doubtless be entitled either to be discharged from imprisonment or to have his sentence made fixed and determinate. But where, as here, his commitment has been suspended pending his appeals, it would be manifestly absurd to say that, because compliance may have become impossible by reason of change of conditions—here, the expiration of the grand jury—he is entitled to go free of all punishment. In such case, the law would be justly a subject of derision and contempt.

In *In re Nevitt* (117 Fed. Rep., 448), the Circuit Court of Appeals for the Eighth Circuit asserted the plenary authority of the courts of the United States to enforce obedience to their orders by fine or commitment, and, for the purpose of securing the rights of suitors, to amend its judgment as the situation may require. If this may be done in the case of private litigants, *a fortiori* should it be allowable where, as here, the rights of the public are concerned. It is a necessary consequence of the indeterminate character of coercive judgments in contempt cases.

The findings of fact of the trial court are conclusive.

Davis v. *Schwartz* (155 U. S., 636, 637).

Grayson v. *Lynch* (163 U. S., 472, 473).

Plaintiff in error apparently recognizes the well-settled rule that an appellate court will not on error inquire into the weight and sufficiency of the evidence, but will accept the findings of fact made by the court below if there was any competent evidence to support them.

That there was competent evidence to support the findings of the District Court has been shown. Ballmann, in his contradictory and evasive answers, practically admitted the existence of the cashbook called for by the subpœna. The testimony of his own employees showed that but one cashbook was used in his business, hence the conclusion was inevitable that it was the one called for by the subpœna. The book was used in the conduct of his business, therefore it had been in his possession and under his control, and presumably was still in his possession and under his control, since its absence was in no way accounted for.

The fact of the existence of the cashbook being established, as well as the fact that it was in his possession or under his control, there can be no question that his refusal to produce it as directed by the court amounted in law to contempt. So also as to his refusal to answer the questions, if they were not privileged.

Ballmann was tried and convicted upon the charges preferred against him, and none other.

In the brief for plaintiff in error, which I have just received, reference is made to certain cases to the effect that one charged with contempt of court can not be punished for some other offense not specified in the charges against him. (*In re Reese*, 107 Fed. Rep., 942; *Parkhurst* v. *Kinsman*, 2 Blatchf., 76; Fed. Cas. No. 10759.) Admitting the principle, I fail to see its application. Ballmann was charged with refusing to answer certain questions propounded to him by the grand jury and with failing to produce the cashbook called for by the subpœna of April 7, and he was tried and convicted upon those charges and none other. He refused to answer the questions, and he failed to produce the cashbook. The court found as a fact, from the evidence adduced and his own statements, that *the* cashbook called for by the subpœna existed and was in his possession and control. To say that the evidence did not warrant this conclusion is one thing; but to say that he was tried and convicted for an offense not specifically charged against him is a very different thing and without foundation in this record.

There being no error in the record, the judgment of the District Court should be affirmed.

HENRY M. HOYT,
Solicitor-General.

O